

*ZBA Role Play Session  
OEP Planning and Zoning Conference - April 28, 2007*

"Dr. Strangelove Or: How I Learned To Stop Worrying And Love The Bomb"

*For more than a year, ominous rumors had been privately circulating among high-level Western leaders that someone had been at work on what was darkly hinted to be the ultimate weapon: a doomsday device. Intelligence sources traced the site of the top secret project to the rural hinterlands below the White Mountain peaks of New Hampshire. What they were building or why it should be located in such a remote and desolate place no one could say...*

### **Agenda**

2:45 - 2:55	Welcome, what we will cover in the session, how it will work, etc.
2:55 - 3:10	Presentation of the case
3:10 - 3:20	Questions (one from each board or more if time permits)
3:20 - 3:35	Deliberation
3:35 - 3:50	Each board reports their decision
3:50 - 4:00	Summary and final questions/discussion

### **Roles**

- **Pres. Merkin Muffley** - *ZBA Chair* - Runs the ZBA like nobody's business and has been doing so for years. Fair and impartial, will let each person have their own say and will allow a limited number of questions from all assembled. Given the busy agenda, will run the meeting like clockwork. (Chris Northrop)
- **Brig. Gen. Jack D. Ripper** - *applicant* - Obsessed with the protection of "precious bodily fluids", the general is determined to make the world a better place by building doomsday devices. Apparently, he believes there is a market for such things and that the world will be a better place if everyone had one. Something about deterrents. Sees no reason why this should not be approved since nothing else will ever be built there. (Ben Frost)
- **G/C Lionel Mandrake** - *disapproving abutter* - Just wants everyone to get along. Does not approve of any doomsday assembly fortified facility in the neighborhood because what if something should go wrong? And besides, it's not allowed by zoning. If you can build a DAFF here, you could build it anywhere. (Kerrie Diers)
- **Maj. T.J. "King" Kong** - *"expert" witness/municipal official* - Knows what to do and how to do it. Thoroughly familiar with all local regulations and will not let some namby-pamby board of adjustment get in his way of delivering justice. The Major is a B-52 pilot and former Texas State Bull Riding champion. (Chris Boldt)

### **Facts**

- The site is 1400 acres comprised of 18 separate lots
- Gen. Ripper has signed a valid purchase and sale agreement with Dr. Strangelove to buy all 18 lots contingent upon obtaining a variance and has standing under the ordinance to apply for the variance
- the application was properly submitted and all notices have been given and posted/published

- the proposed use is legal, though not allowed by zoning
- the proposal meets all lot size and frontage requirements
- the proposal will require a site plan review by the planning board if a variance is granted
- the proposed factory has nothing to do with national defense, the federal government or the US military - it is strictly a 'for profit' business proposal and not exempt from any local land use regulations - there are no preemption issues here
- though a Brigadier General in the Air Force, Ripper is freelancing on his own initiative

## **Deliberation**

Is this a "use" or "area" variance?

What hardship standard do you apply?

Don't forget, there are 5 variance criteria which all must be met:

**1. no decrease in value of surrounding properties would be suffered;**

**2. granting the variance would not be contrary to the public interest;**

**3. denial of the variance would result in unnecessary hardship to the owner seeking it;**

A. **Use variance** - *Simplex* analysis

(1) *The zoning restriction as applied to the applicant's property interferes with the applicant's reasonable use of the property, considering the unique setting of the property in its environment.*

Rather than having to demonstrate that there is not any reasonable use of the land, landowners must now demonstrate that the restriction interferes with their reasonable use of the property considering its unique setting. The use must be reasonable. The second part of this test is in some ways a restatement of the statutory requirement that there be something unique about this property and that it not share the same characteristics of every other property in the zoning district.

(2) *No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restrictions on the property.*

Is the restriction on the property necessary in order to give full effect to the purpose of the ordinance, or can relief be granted to this property without frustrating the purpose of the ordinance? Is the full application of the ordinance to this particular property necessary to promote a valid public purpose?

This test attempts to balance the public good resulting from the application of the ordinance against the potential harm to a private landowner. It goes to the question of whether it creates a necessary or "unnecessary" hardship.

(3) *The variance would not injure the public or private rights of others.*

This is perhaps similar to a "no harm - no foul" standard. If the granting of the variance would not have any negative impact on the public or on private persons, then perhaps this condition is met. Stated differently, would the granting of the variance create a private or public nuisance?

This requirement, to some degree, overlaps with the requirement that the granting of a variance not result in a diminution of value of surrounding properties.

All three conditions must be satisfied for unnecessary hardship to exist under this standard.

**B. Area (dimensional) variance - Boccia analysis**

(1) *Special conditions of the property make an area variance necessary in order to allow the applicant to construct the development as designed; and*

(2) *The applicant cannot achieve the same benefit by some other reasonably feasible method that would not impose an undue financial burden.*

In applying the first prong, the owner does not need to establish that without the variance the property would be valueless—rather, that practical considerations make it difficult or impossible to implement a permitted use, given the special conditions of the property. In the *Boccia* case, the Court found that this prong had been met by the developer, owing to the configuration of the property and the presence of wetlands.

The second prong calls for an examination of other reasonably feasible alternatives. The Court clearly stated that the developer's financial considerations do indeed become part of the calculus of what is reasonable. Undue financial burdens should not be imposed upon a landowner, so the relative expense of alternatives must be examined.

**4. by granting the variance substantial justice would be done; and**

**5. the use must not be contrary to the spirit and intent of the ordinance.**

**ZONING ORDINANCE  
For the  
Town of Rheinken, New Hampshire**

**ARTICLE I  
General Provisions**

**Minimum lot size.**

Lot sizes shall be appropriate for the location and type of use and shall conform to the requirements of Article III of this chapter, unless the requirements of a particular district prescribe a larger minimum size than provided in Article III, in which case the provision requiring the larger minimum lot size shall control.

**General use restrictions.**

No building, structure or land shall be used except for the purposes permitted in the districts as specified in this chapter. Any use not listed shall be construed to be prohibited.

**ARTICLE II  
RR Rural Residential District**

**Purpose.**

The RR Rural Residential District provides for a mixture of agriculture and low-density rural living outside of the built-up districts of the community where public water and sewer services are not generally available. The low-density open areas complement and encourage agricultural uses that are characteristic of the town. With additional safeguards, certain uses appropriate to a rural setting are allowed by special exception.

**Land uses.**

A. Permitted uses and uses allowed by special exception shall be as follows:

Permitted Uses

- Home rental of up to 1 apartment
- Single-family dwellings
- Two-family dwellings
- Home business
- Agricultural
- Open space residential development
- Use accessory to permitted use
- Manufactured Housing
- Bed & Breakfast Homes

Uses allowed by Special Exception

- Institutional
- Home rental of 2 or more apts.
- Home business/retail
- Manufactured Housing Park
- Use accessory to special exception
- Excavation on land accessible to a state highway by traveling a distance no greater than 1,000 feet on secondary roads

B. No more than two home businesses shall be permitted per lot at any one time; provided, further, that adequate off-street parking is provided on the premises.

C. No building shall be constructed more than three stories above grade level.

D. No building shall be constructed within 30 feet of a public right-of-way, except that a building may be constructed in line with existing adjacent buildings within the same lot.

E. No buildings shall be constructed within 15 feet of side or back lot boundaries. Two parking spaces must be provided on the premises for each dwelling unit constructed. No parking space or access driveway shall be located within 10 feet of any side or back lot boundaries, and no parking space shall be located within 10 feet of a public right-of-way.

### **ARTICLE III Lot Size Regulations**

**Lot size and shape.**

Lot size, width, depth, shape and orientation shall be appropriate for the location of the proposed use.

**Minimum lot sizes.**

Minimum lot sizes shall be determined by the minimum lot size required by the individual zoning districts.

**Lot size table.**

The lot size requirements are specified as follows:

<b>Zoning District</b>	<b>Town W&amp;S</b>	<b>No Town W&amp;S</b>	<b>Minimum Frontage</b>
Rural Residential	5 acres	5 acres	125 feet

### **ARTICLE IV Zoning Board of Adjustment**

**Granting a Variance.**

The Board of Adjustment may, on an appeal, grant a variance from the provisions of this chapter, if all the following facts are found by the Board of Adjustment and such finding is specified in its decision:

A. That there are unique physical circumstances or conditions including irregularity, narrowness or shallowness of lot, size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of this chapter in the neighborhood or district in which the property is located.

B. That because of such physical circumstances or conditions there is no possibility that the property can be used in strict conformity with the provisions of this chapter for a permitted use of the applicant's choice and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.

C. That the variance if authorized will not alter the essential character of the neighborhood or district in which the property is located nor substantially or permanently impair the appropriate use or development of adjacent property nor be detrimental to the public welfare.

D. That the variance if authorized will represent the minimum variance that will afford reasonable relief.

## APPLICATION FOR AN AREA VARIANCE

To: Board of Adjustment,  
Town of Rheinken

Do not write in this space: Case No: <u>1-4-28-07</u> Date filed: <u>4/4/07</u> <u>Merkin Muffley</u> (signed – ZBA)
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Name of applicant Brig. Gen. Jack D. Ripper  
Address Burpelson AFB, Plano, TX  
Owner Dr. Strangelove  
(if same as applicant, write "same")

Location of property Kubrick Road tax map # 3-9; 33-39; 59-61; and 84  
(street, number, sub-division & lot number)

NOTE: This application is not acceptable unless all required statements have been made.  
Additional information may be supplied on a separate sheet if the space provided is inadequate.

## APPLICATION FOR AN AREA VARIANCE

A variance is requested from article II of the zoning ordinance to permit:  
construction of a doomsday assembly fortified facility (DAFF) on 20 acres out of a 1400 acre site. Bureau of Alcohol, Tobacco and Firearms (BATF) regulations prohibit inhabited structures from being closer than 2,275 feet from the facility and the subject site is the perfect location.

Facts supporting this request:

1. The proposed use would not diminish surrounding property values because:  
use as a DAFF will preserve the vast majority of the land in question in its current use as green space and any concern for safety and environmental impact is slight. The parcel in question is approximately 1,400 acres large, but Gen. Ripper only intends to use approximately 20 acres. These 20 acres will be centrally located within the site. Thus, the proposed DAFF will not be visible from the existing road or surrounding properties. Further, in light of the fact that BATF requires substantial distances to any occupied structure, our presence on the site will prevent the parcel in question to be used for commercial or residential development. Therefore, the lion's share of the parcel will remain in its current condition -- a heavily wooded green space. Preserving this green space will certainly not detract, and may even enhance, the surrounding areas.

Safety concerns and environmental impact will not have an effect on area property values. Gen. Ripper and the DAFF industry have a proven track record of safety. The DAFF industry has roughly the same accident rate as traveling by bus and is far safer than skiing or canoeing.

2. Granting the variance would not be contrary to the public interest because:  
the DAFF presence at the site will keep the vast majority of the land in its current condition and the proposed use will not add significant stress to local services. As stated, the BATF table of

distances will prevent the land from being used for other commercial or residential development. The public's interest will be therefore served by continuing to maintain the majority of this land as green space.

3. Denial of the variance would result in unnecessary hardship to the owner because:

The current rural residential zoning interferes with Gen. Ripper's proposed reasonable use for the property. Under current zoning, Gen. Ripper is unable to use the property to conduct his business in any way. The unique characteristics of this property make the proposed use reasonable. The fact that this parcel is extremely large and uninhabited makes it ideal to assemble doomsday devices. Gen. Ripper must maintain the facility a significant distance from any occupied structure according to BATF regulations. The size of the parcel at issue permits him to meet this legal obligation. For the same reason, the proposed use of the property for assembly of doomsday devices is reasonable. The central location of the facility within the proposed site will permit the facility to be both a safe distance from any other structures and out of view from any neighbors or the roadway.

No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction of the property in this instance. The rural residential zoning ordinance is in place to maintain the residential nature of neighborhoods and preserve low-density open areas. The proposed project is in harmony with and supports the stated goal of the Rural Residential District. The proposed use will prohibit other large-scale development of houses or industry at this particular location. As a consequence, the project will preserve the vast majority of the green space at the location at issue. The project will preserve this area as a low-density open space. In this way, the proposed project is not at all at odds with the stated goal of the Rural Residential District. Therefore, in this instance, there is no fair and substantial relationship between the zoning ordinance and the restriction on the property that would prohibit the proposed use.

The zoning ordinance will not interfere with the public and private rights of others. Because of its proposed location at the center of a large tract of land, the proposed use of the land will have no appreciable impact on its neighbors or the community. Rather, its presence at this location will keep the vast majority of the site in question intact in its current condition. In this way, the proposed use of the land will actually preserve the existing public and private rights of others.

For all of these reasons, denial of the variance would present a substantial hardship to the applicant.

4. Granting the variance would do substantial justice because:

Justice would be served by granting the requested variances. For Rheinken, granting the variance would ensure that the vast majority of the land at issue would be maintained in its current wooded condition and would not be at risk for large scale residential or commercial development. Gen. Ripper expects to make some improvements to the existing road and will solicit bids from Rheinken contractors for work on the building and entertain those bids to the extent that they are competitive. Further, as Gen. Ripper seeks to hire new employees and fill vacancies, he expects to hire Henniker residents. At the same time there would be little added pressure on local services.

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5. The use is not contrary to the spirit of the ordinance because:

The spirit and intent of the ordinance is served by granting the requested variance. The spirit and intent of the rural residential zone is to encourage low density uses for the land. This is just such a use. The proposed facility will occupy only a small fraction of a large tract of undeveloped land, leaving the majority of the land in its current condition. The DAFF facility will further be out of sight of neighbors and adjacent roadways.

Applicant Jack. D. Ripper Date April 4, 2007  
(Signature)



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